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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 289

JOSEPH MORRIS, FRANCIS J. BAILEY, ARTHUR P. LINDSEY, LESTER M. ANGLIN, JESSE J. WORD, EDWIN E. WILLIAMS, ALVIN J. PALMER, WILLIAM D. CROWELL, DAVID MOZEE, SAMUEL MOSELY, COLUMBUS C. BROOKS, JR.,

Petitioners,

vs.

RICHARD ATTREAU,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,
511 City Hall Building,
Chicago, Illinois 60602,

SYDNEY R. DREBIN,
MARVIN E. ASPEN,
Assistant Corporation Counsel,
Attorneys for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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Petitioners,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on March 21, 1966.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals, printed in Appendix A hereto, *infra* App. p. 13, is reported at 357 F. 2d 871.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 21, 1966. Rehearing was denied on April 19, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). Although it might be argued that the ruling of the Court of Appeals is not "final" in the sense that the "cause is remanded to the district court for further proceedings in due course", this Court has taken jurisdiction in similar cases where the Court of Appeals has reversed a ruling of the District Court dismissing a complaint. *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2 (1946); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, n. 3 (1948). *Cf. Mills* v. *Alabama*, ... U. S. ..... (No. 597—October Term, 1965), decided on May 23, 1966 (34 LW 4418, 4419). The reasons given in the above cited cases for taking jurisdiction, namely a novel and important question of law, the avoidance of wasting time and energy of judiciary and the fairness to parties, are also present in the instant cause.

QUESTIONS PRESENTED.

1. Whether the federal civil rights act may be invoked to review the internal administrative policies of a metropolitan police department as they relate to individual members of the department?

2. Whether a false arrest in and of itself invokes federal civil rights act liability?

STATUTES INVOLVED.

The statute involved is 42 U. S. C., Section 1983. It is printed in Appendix B, *infra* App. p. 21.

STATEMENT.

Respondent is a Chicago police officer with the rank of patrolman. Petitioners were also police officers assigned to the "Internal Investigation Division" of the Chicago Police Department. App. p. 13.

The duties of the members of the Internal Investigation Division are correctly set forth by the United States Court of Appeals for the Seventh Circuit in *Magee* v. *Williams*, 329 F. 2d 470, 473 (7th Cir. 1964) as to partake in "investigation of members of the police department as a means of checking on the integrity and honesty of policemen only when cause exists therefor. . . ." The Seventh Circuit added (p. 475) that this plan "was to determine *which* police officers were dishonest. That determination would afford a basis for discharging such men. This plan obviously, if successful, would operate for the good of the public as well as every honest police officer."

Respondent's complaint set forth the unsupported conclusion that he was arrested by petitioners. It sets forth no facts supporting this conclusion. The only facts stated in the complaint pertaining to the alleged arrest are that on March 13, 1962, respondent was allegedly detained and questioned for a period of twelve hours by petitioners.

The essence of the complaint reads (App. pp. 14-15):

> (1) On March 13, 1962, defendants [petitioners] Morris, Bailey and Mozee arrested plaintiff [respondent] without a warrant or probable cause or other lawful authority and, with the cooperation of the other defendants, detained him for twelve hours at their unit headquarters. No charges were filed against plaintiff as a result of this arrest and detention.
>
> (2) During the arrest on March 13, 1962, defendants threatened to cause plaintiff's imprisonment and discharge from his employment.
>
> (3) On May 2, 1962, defendants were instrumental

in causing the return of an indictment in the Criminal Court of Cook County against plaintiff, based on perjured testimony, which indictment falsely charged plaintiff with the crime of "Official Misconduct."

(4) Defendants were also instrumental in causing the superintendent of police to file charges against plaintiff before the police board. These charges falsely accused plaintiff with violation of certain state criminal statutes and rules and regulations of the police department of the city.

(5) Defendants Morris, Bailey, Lindsey, Anglin, Word, Williams, Palmer, Mozee and Mosley caused plaintiff to be suspended from his position as a police officer from the day of his arrest, March 13, 1962, until April 11, 1963, when he was ultimately fully cleared by the police board and restored to duty.

At the time of the alleged arrest of respondent, Rule 298 of the Chicago Police Department was in effect, and provided (App. p. 18):

> "Although certain hours are allotted for the performance of regular duty assignments, a police officer is required to respond immediately to any police emergency regardless of when or where it may occur within the corporate boundaries of the City of Chicago and is subject to applicable provisions of the Rules and Regulations of the Department at all times."

General Order 16 (3) of the Chicago Police Department, also in effect on March 13, 1962, provided in part (App. p. 19):

> "all personnel of the Department will cooperate fully with the Internal Investigation Division staff, responding to requests for information, records, and reports."

On January 27, 1963, the criminal charges filed against respondent were dismissed. On April 11, 1963, the Police Board of the City of Chicago cleared respondent of the charges brought before it and restored him to duty. On March 21, 1966, a judgment order was entered in the case of

People ex rel Richard Attreau v. *Orlando W. Wilson, et al.*, Circuit Court of Cook County, Illinois case No. 65 L 20024, providing that the respondent recover *all pay* for the 13 month period of suspension (March 13, 1962 through April 11, 1963), less a two month period for which he signed written salary waivers. No appeal was taken from this court order awarding respondent back-salary for the period of his suspension.

On January 23, 1964, respondent filed his action under the federal civil rights act. The complaint was dismissed in the United States District Court for the Northern District of Illinois, Eastern Division, on February 5, 1965. The United States Court of Appeals for the Seventh Circuit in a 2-1 decision reversed the District Court ruling and remanded the cause for trial.

The opinion of the Court of Appeals was authored by Circuit Court Judge Elmer J. Schnackenberg and joined in by Circuit Court Judge Luther M. Swygert. However, Circuit Court Judge Win G. Knoch dissented, stating that he "would affirm the judgment of the trial court." App. p. 20.

REASONS FOR GRANTING THE WRIT.

1. The opinion of the Court of Appeals sets forth a new application of the federal civil rights act, i.e., to review the internal administrative and disciplinary procedures of a local police department. The opinion permits a police officer, who is dissatisfied with his superior's manner of supervising his activities, to invoke the federal civil rights act as a means of redress.

This application of the federal civil rights act poses an issue of national importance. The opinion affects the internal administrative structure and procedures of every metropolitan police department in the nation. It is one thing to hold police personnel accountable under the federal civil rights act for civil wrongs perpetrated under color of law against civilians. However, it is an entirely new and different proposition to hold that the federal civil rights act may be invoked by members of a police department who become dissatisfied with the lawful orders of their departmental superiors. The opinion stands for this latter proposition. This Court should take jurisdiction of this cause to resolve this important question of first impression and national importance.

In the case at bar, the complaint affirmatively shows that respondent was *not* arrested, but rather that he was obeying the lawful rules and regulations of the Chicago Police Department (Rule 298 and General Order No. 16 (3)) by appearing at Unit Headquarters and co-operating in a 12 hour investigation by the Internal Investigation Division. App. p. 14. Circuit Judge Knoch in his dissent correctly described respondent's alleged "arrest" as follows (App. p. 20):

> "Apart from plaintiff's conclusory statement that he was arrested, his complaint sets out only that plaintiff, a policeman, was detained by other 'police officers duly assigned * * * to the "Bureau of Inspection Service" and a sub-department thereof designated "Internal Investigation Unit" * * *' for a full 8-hour day plus 4 hours of overtime. In his brief, he says that this detention took place at unit headquarters. As a policeman, surely plaintiff was subject to supervision of his official activities."

The net result of the opinion of the Court of Appeals is to allow a police officer, who is held accountable by departmental rule to co-operate in a lawful investigation by the disciplinary unit of his department, to merely allege that this co-operation constituted an unlawful "arrest" and thereby become entitled to a civil rights act trial. Thus, the Court of Appeals would put the federal courts in the role of a super administrative reviewing tribunal required to "second guess" the internal disciplinary measures of the department. This federal "review" of the internal affairs of the Chicago Police Department would play havoc with the orderly disciplinary routine of the department and would undermine the supervisory control so necessary to the effective functioning of this quasi-military body. *Cf. Coane* v. *Geary,* 298 Ill. App. 199 (1939); *Martin* v. *Civil Service Commission,* 7 Ill. App. 2d 128 (1955). State law (Ill. Rev. Stat. 1965, ch. 24, pars. 3-7-3.1, 10-1-1 to 10-1-48), providing for civil service status, administrative review of department discipline by an independent Police Board, and State Court review of Police Board rulings, adequately protects an aggrieved officer from unwarranted action by the department. Internal departmental relations and supervision should not be clouded by threat of civil rights act liability. Such review of the internal affairs of the police department is not a proper application of the civil rights act as intended by Congress.

2. Assuming *arguendo* that respondent's voluntary cooperation with his superiors constitutes an "arrest", the opinion of the Court of Appeals is nevertheless erroneous in that it authorizes the federal civil rights act to be invoked in cases which amount to simple false arrest or malicious prosecution under State tort law. The Court of Appeals characterizes petitioners' contention that an "invalid arrest is not in and of itself a violation of the federal civil rights act" as an "abstract proposition" (App. p. 16). This reasoning is fallacious.

The opinion fails to cite what federal law or constitutional right, immunity or privilege respondent was deprived of by petitioners. The Fourteenth Amendment is the only constitutional reference in the opinion. But nowhere in the opinion is it shown how petitioners' actions were in violation of the Fourteenth Amendment. The only Federal law referred to in the opinion is 42 U. S. C., Section 1983 which affords redress for wrongs (but does not set forth substantial rights, privileges or immunities as such).

The opinion of the Court of Appeals attempted to rebut petitioners' contentions and distinguished the cases presented to it by petitioners, but cited no case or precedent for the decision. The reason is obvious. *There is no precedent for the Court of Appeals decision.* The precedent is to the contrary.

The essence of the complaint is a charge of false arrest. In his brief and argument before the Court of Appeals, respondent cited the landmark case of *Monroe* v. *Pape*, 365 U. S. 167 (1961), as precedent for granting him relief under the federal civil rights act.

In *Monroe*, the complaint alleged (p. 169):

> "That 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked

> every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, *that he was subsequently released without criminal charges being preferred against him.* It is alleged that the officers had no search warrant and no arrest warrant and that they acted 'under color of the statutes, ordinances, regulations, customs and usages' of Illinois and of the City of Chicago." (Emphasis added.)

The United States Supreme Court held that this *totality of action as alleged in the complaint* stated a cause of action. There is no statement in *Monroe* that an unlawful arrest in itself *ipso facto* creates federal civil rights act liability.

The constitutional wrong in *Monroe* was an unreasonable search and seizure. This Court stated the basis for the *Monroe* decision succinctly (p. 171):

> "Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of RS § 1979. See *Douglas* v. *Jeannette,* 319 U. S. 157, 161, 162, 87 L. ed. 1324, 1327, 1328, 63 S. Ct. 877, 882. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment."

In *Agnew* v. *City of Compton,* 239 F. 2d 226 (9th Cir. 1957) (overruled on other grounds in *Cohen* v. *Norris,* 300 F. 2d 24 (9th Cir. 1962)), the Court decided this same issue adversely to the position of respondent herein. The contents of the *Agnew* complaint are described by the court as follows (pp. 228-229):

"It is alleged in the complaint that, acting without a warrant, the two police officers entered Agnew's premises, arrested him, seized some of his property, and transported him to jail in a police vehicle. When arrested, Agnew was peaceably conducting an auction of his own property as an isolated transaction. At the jail, he was charged with engaging in the business of auctioneering without a city permit. He was also charged with engaging in the business of electrical contracting without a city license.

"Agnew was then subjected to the usual routine of photographing and fingerprinting, after which he was released on two-hundred-dollar bail. Two days later, the charges were dismissed by the Compton municipal court. The electrical inspector, however, still refuses to issue electrical permits to Agnew for installations in Compton, unless he first secures a city electrical contracting license. The city and the inspector also threaten to arrest Agnew if he engages in that business in Compton without such license.

"It is alleged that the acts complained of were committed wrongfully, maliciously, and while acting under color of the police power of the city. It is further alleged that these acts were committed as a part of a conspiracy among appellees to deprive appellant of numerous federal rights secured by the Constitution and federal statutes."

In *Agnew,* just as in the instant cause, the essence of the complaint was that respondent was erroneously arrested. In dismissing the complaint, the court held (p. 229):

"No one has a constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest."

The question of whether a false arrest in and of itself invokes federal civil rights act liability is a question of first impression before this Court. It was a question of first impression before the court below. However, the Court of Appeals chose not to meet the challenge of deciding it

squarely. The question of whether or not a false arrest or a malicious prosecution action in and of itself warrants federal civil rights act liability is of too great an importance to be ignored as it was by the Court of Appeals.

To allow respondent's contention that a single allegation of erroneous arrest or prosecution in itself states a valid claim under the civil rights act would afford federal court jurisdiction for the trial of every common law action for false arrest or malicious prosecution. Certainly it was not the intent of Congress that every tort action under State law committed by a police officer should be compensable under the civil rights act. For example, every time a State police officer physically interferes with the free travel of a citizen even for moments and even under suspicious circumstances, an arrest occurs. See, e.g., 6 C. J. S. Arrest § 1 (1937) and the cases cited thereunder. Clearly, as shown above, this is not the purpose of the civil rights act as intended by Congress.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,
SYDNEY R. DREBIN,
MARVIN E. ASPEN,
Assistant Corporation Counsel,
Attorneys for Petitioners

APPENDIX A.

Opinion of the United States Court of Appeals for the Seventh Circuit, reported at 357 F. 2d 871:

Before SCHNACKENBERG, KNOCH and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Richard Attreau, plaintiff, has appealed from an order of the district court dismissing with prejudice his complaint charging Joseph Morris and other defendants[1] with violating his rights under the federal civil rights act, 42 U. S. C. A. § 1983, and the fourteenth amendment of the constitution of the United States. It is plaintiff's contention that the district court committed error in ruling that the complaint failed to state a cause of action.

We now consider the facts as alleged in the complaint. Plaintiff, of Chicago, Illinois, a citizen of the United States, was and is employed by that municipal corporation, as a police officer with the rank of patrolman. Defendants were also police officers of said city and were assigned to the "internal investigation unit" of its police department.

With regard to the wrongs complained of, plaintiff avers that defendants were acting in the course of their employment and in performance of their duties as such police officers, under color of the statutes, ordinances, regulations, constitution and usages of the city of Chicago, county of Cook and state of Illinois; and that, on or about February 5, 1962, an anonymous letter to the

1. Francis J. Bailey, Arthur P. Lindsey, Lester M. Anglin, Jesse J. Word, Edwin E. Williams, Alvin J. Palmer, William D. Crowell, David Mozee, Samuel Mosely, Columbus C. Brooks, Jr.

superintendent of police of the city charged that said defendants and other police officers were guilty of accepting "payoffs" to permit violations of law to take place without police interference, in the Englewood police district. Shortly after receipt of this letter, defendants questioned plaintiff as to any evidence in his possession about misconduct or dereliction of duty by any officer assigned to the Englewood police district and were advised by plaintiff that he had no such knowledge.

Thereupon, to embarrass Captain Braband, commanding that district, because of their personal dislike for him and other officers in that district, defendants embarked upon a plot to exculpate themselves from the charges in said letter, and defendants Morris, Bailey and Mozee sought to compel plaintiff to accuse Braband and detective John Sexton, assigned to said district, of malfeasance and misfeasance, threatening plaintiff that they would cause him to be arrested, prosecuted and discharged from his position if he did not make such accusations. When plaintiff refused to accede to these threats, defendants, in furtherance of their plot, in concert did the following things:

(1) On March 13, 1962, defendants Morris, Bailey and Mozee arrested plaintiff without a warrant or probable cause or other lawful authority and, with the cooperation of the other defendants, detained him for twelve hours at their unit headquarters. No charges were filed against plaintiff as a result of this arrest and detention.

(2) During the arrest on March 13, 1962, defendants threatened to cause plaintiff's imprisonment and discharge from his employment.

(3) On May 2, 1962, defendants were instrumental in causing the return of an indictment in the Criminal

Court of Cook County against plaintiff, based on perjured testimony, which indictment falsely charged plaintiff with the crime of "Official Misconduct."[2]

(4) Defendants were also instrumental in causing the superintendent of police to file charges against plaintiff before the police board. These charges falsely accused plaintiff with violation of certain state criminal statutes and rules and regulations of the police department of the city.

(5) Defendants Morris, Bailey, Lindsey, Anglin, Word, Williams, Palmer, Mozee and Mosley caused plaintiff to be suspended from his position as a police officer from the day of his arrest, March 13, 1962, until April 11, 1963, when he was ultimately fully cleared by the police board and restored to duty.

The complaint further alleged that on January 27, 1963, plaintiff's case was called for trial in the Criminal Court of Cook County, Illinois, and he, with his counsel, was present and answered that he was ready, but the state's attorney made a motion of *nolle prosequi,* which was granted, thus ending the proceeding.

The complaint asserts that the foregoing constituted a plot agianst him by defendants under color of law and that he was thereby deprived of his liberty, pursuit of happiness and property without due process of law. In particular, he states that his reputation, credit and standing became a subject of scandal and disgrace among those who knew him and that he incurred expense in procuring his discharge from custody and in defending himself, and lost wages which he would otherwise have earned.

---

2. According to the complaint, since plaintiff did not have possession of the grand jury minutes when the instant action was initiated, he was not able to allege the names of the specific persons who actually falsely accused him before the grand jury.

Defendants' motion to strike the complaint and dismiss the cause of action is based on two grounds:

(1) Plaintiff's complaint is replete with immaterial allegations and conclusions.

(2) Plaintiff's complaint does not indicate any violation of 42 U. S. C. A. § 1983 or the fourteenth amendment of the constitution of the United States.

1. In this court defendants argue that an invalid arrest is not in and of itself a violation of the federal civil rights act.

We are not called upon to decide the correctness of this abstract proposition. The arrest and detention for twelve hours, without a warrant or probable cause or other lawful authority, as alleged in the complaint, accompanied by threats that plaintiff would be imprisoned and discharged from his employment, the procuring of his indictment, his suspension as a police officer for nearly thirteen months, and the charging that plaintiff had violated various statutes and rules and regulations of the police department, must all be considered together in determining whether the complaint sufficiently charges a violation of the civil rights act. We hold that the complaint contains sufficient allegations to support this charge.

Our conclusion is not in any way at variance with *Magee* v. *Williams*, 329 F. 2d 470 (1964), where we held that a police officer of the city of Chicago could not maintain an action, 28 U. S. C. A. §§ 1331 and 1343, and 42 U. S. C. A. §§ 1981, 1983, 1985 and 1986. There, plaintiff was a city motorcycle policeman who stopped a speeding car driven by one Williams, who was actually a member of the internal investigation division of the Chicago police department (the same organizational unit as here

involved). Magee rejected an offer of a bribe by Williams. Magee, believing that he had reasonable grounds for so doing, compelled Williams to submit to a search of his person, by reason of what appeared to be a gun. Thereupon Magee discovered a hidden recording device installed on Williams' person, intended to record Magee's conversation and his anticipated acceptance of a bribe offer. Magee was prevented from taking the recording device from Williams by two other city policemen who came and seized the device, informing Magee that it was police department property. Later Magee was told by a superior officer to release Williams, together with all articles taken from him. Magee did so and returned to his assigned duty.

We held that there was no attempted entrapment of Magee and, at page 475, we said:

> "* * * Therefore, we might be justified in treating as irrelevant the contention that an *attempt* to entrap him caused him actionable damage under the Civil Rights Act. However, we prefer to meet this contention. How was he damaged? It has not been questioned that the general purpose of Superintendent Wilson and the other defendants was to determine *which* police officers were dishonest. That determination would afford a basis for discharging such men. This plan obviously, if successful, would operate for the good of the public as well as every honest police officer. Plaintiff claims that he has always had a reputation as such an officer, an assertion which is not disputed. If his reputation was grounded upon fact, he had nothing to fear if, in the operation of the cleansing plan, there was applied to him, an honest officer, the same test as was applicable to every other officer. If a driver whom he detained for a violation of law offered him a bribe which he refused, he was not damaged. Only by a later tortuously legalistic resort to the doctrine of entrapment was an effort made to demonstrate that he

was damaged, because the conversation between plaintiff and the driver had been electronically recorded. The fallacy lies in the fact that in that conversation, according to plaintiff himself, he said nothing inconsistent with his faithful performance of his duty as an honest police officer.

"Stated briefly, plaintiff's complaint shows that, when submitted to a fair test designed for all police officers, he proved himself honest. Undoubtedly he was at the time justifiably gratified. Thereafter a prospect for monetary gain appeared and hence this litigation ensued. However, virtue is its own reward. Certainly there is no federal law that a policeman be awarded damages simply because he did his work honestly."

Obviously Magee's rights under federal law were not violated. In contrast, the complaint's allegations, which are not now denied in the case at bar, show that plaintiff's rights under federal law were violated.

2. But defendants' counsel contend in this court that, as a matter of fact, what plaintiff is really complaining about is not an arrest but simply his co-operative submission to an effective and fair investigation, as required by rule 298 of he polce department and its General Order 16 (3).

Rule 298 on March 13, 1962 provided:

"Although certain hours are allotted for the performance of regular duty assignments, a police officer is required to respond immediately to any police emergency regardless of when or where it may occur within the corporate boundaries of the City of Chicago and is subject to applicable provisions of the Rules and Regulations of the Department at all times."

General Order 16 (3), in effect on March 13, 1962, provided, in part:

> "All personnel of the Department will cooperate fully with the Internal Investigation Division staff in responding to requests for information, records, and reports."

The short answer to defendants' contention is that a question of fact may be present as to whether *their counsel's* present characterization of the conduct of defendants, as appearing in the complaint, is to be believed, or whether plaintiff's characterization thereof is to be believed. This issue requires that defendants answer the complaint, join issues and permit the trier of facts to decide the factual issues. We cannot decide by merely considering defendants' factual contention as stated in their brief. They should be required to file an answer. *Coleman* v. *Johnson,* 7 Cir., 247 F. 2d 273, 275 (1957).

3. Contrary to defendants' argument, we hold that the fact that plaintiff was indicted does not preclude this suit. They cite no federal court decision which supports their argument. *Cf. Kozlowski* v. *Ferrara,* 117 F. Supp. 650, S. D. N. Y. (1954). Persuasive, although probably not binding on the federal courts, is the rule announced in *Freides* v. *Sani-Mode Mfg. Co.,* 33 Ill. 2d 291, 211 N. E. 2d 286 (1965), where the Illinois Supreme Court held that the return of an indictment does not grant defendants an absolute defense in a malicious prosecution action. At 296, that court stated:

> "An indictment is but a formal accusation of a crime. * * *"

Seeking support from *Ravenscroft* v. *Casey,* 2 Cir., 139 F. 2d 776 (1944), defendants maintain that the grand jury's action under the circumstances of the case at bar "* * * would preclude an action against the persons who caused * * * [plaintiff's] arrest and prosecution for commission of a felony". *Ravenscroft* was a diversity action for malicious prosecution under New York law.

Plaintiff was a citizen of Ohio. The undisputed facts in her amended complaint revealed that plaintiff had been held for the grand jury by a police justice. The United States Court of Appeals, at 778, held this showed the presence of probable cause, under state law, which precluded the action.

The case at bar is not a diversity action governed by state law. It is a federal action, and we hold as federal law that the indictment of plaintiff did not preclude this action.

For all of these reasons, the order from which this appeal was taken is reversed, and this cause is remanded to the district court for further proceedings in due course.

REVERSED AND REMANDED WITH DIRECTIONS.

No. 15105 KNOCH, *Circuit Judge,* dissenting. I find myself unable to agree with my colleagues in this matter. If we ignore mere conclusory statements, unsupported by specific factual allegations, the complaint in my opinion falls short of setting out a claim on which relief may be granted under the Federal Civil Rights Act. Apart from plaintiff's conclusory statement that he was arrested, his complaint sets out only that plaintiff, a policeman, was detained by other "police officers duly assigned * * * to the 'Bureau of Inspectional Service' and a sub-department thereof designated 'Internal Investigation Unit' * * *" for a full 8-hour day plus 4 hours of overtime. In his brief, he says that this detention took place at unit headquarters. As a policeman, surely plaintiff was subject to supervision of his official activities. Further than that, plaintiff charges that the defendants threatened to "cause" initiation of unjustified legal proceedings against him and successfully carried out their threats. I would affirm the judgment of the trial court.

APPENDIX B.

Statute Involved.

Title 42, United States Code:

§ 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES P. CHAPMAN
39 South La Salle Street
Chicago, Illinois 60603
Attorney for respondent

The Scheffer Press, Inc.—ANdover 3-6850

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RICHARD ATTREAU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Position of respondent

It is the position of respondent that the subject petition should be denied for the following reasons:

1. The instant case involves a proper and well recognized application of § 1983 of the federal civil rights act to a complaint which charges that under color of state law, petitioners employed their sensitive positions in the Chicago police department to arrest and detain respondent, to cause him to be suspended from the police force for over thirteen months, to falsely accuse him of crime before the Chicago Police Board and in the Criminal Court of Cook

County, in order that petitioners could exculpate themselves from criminal charges and to satisfy their personal animosities against respondent and other police officers.

2. *Every* federal authority which has considered allegations of a similar nature has held that a cause of action is stated under § 1983 of the federal civil rights act. For example, see *Culp* v. *U.S.*, 131 F. 2d 93 (C.A. 8, 1942); *Brown* v. *U.S.*, 204 F. 2d 247 (CA. 6, 1953); *Hardwick* v. *Hurley*, 289 F. 2d 529, 531 (C.A. 7, 1961); *Bargainer* v. *Michal*, 233 F. Supp. 270 (N.D. Ohio, 1964) and *Beauregard* v. *Wingard*, 230 F. Supp. 167 (S. D. Cal. 1964).

3. Petitioners cannot cite a *single* authority which in any way suggests that a cause of action has *not* been stated under the federal civil rights act.

4. Petitioners incorrectly state that the questions raised in this case are whether the federal civil rights act may be used to review the internal administrative policies of a police department and whether a false arrest of itself violates the federal civil rights act. None of these issues are involved in the instant case and the latter issue was specifically not decided by the Court of Appeals.

5. Petitioners have gone far outside of the record to inject matters which at best constitute *factual defenses* to the charges of respondent. These factual defenses demonstrate the validity of the Court of Appeal's conclusion that this case should be remanded for a trial on all of the facts.

6. The instant case raises no new or unusual questions of law nor does it conflict with any decision of this Court or any other federal court. The decision is proper in all respects.

Statement of Facts

The opinion of the Court of Appeals sets out in full the wrongful acts attributed to petitioners (petition 13-15). Peitioners in their "Statement" (petition 3-5) omit any reference whatsoever to the wrongful and ulterior motives which impelled them to commit the improper acts attributed to them. Thus, respondent alleged that petitioners arrested and detained him without cause, caused him to be suspended from duty, caused him to be falsely accused before the Police Board, and caused him to be indicted on the basis of perjured grand jury testimony, in order that petitioners could exculpate themselves from criminal charges and to satisfy their personal animosities against other officers. Petitioners were especially motivated against respondent because he had refused to wrongfully accuse the captain of the district to which he was assigned and another officer in that district, despite petitioners' request to the contrary (petition 14-15).*

The case is hardly one of an erroneous arrest and prosecution, as suggested by petitioners (petition 11).

Accordingly, respondent calls the Court's attention to the statement of facts contained in the Court of Appeals' opinion and respectfully submits that a cause of action is stated under § 1983 of the federal civil rights act.

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* Petitioners' reference to *Magee* v. *Williams*, 329 F. 2d 470 (C.A. 7, 1964) (petition 3) in describing the purpose of the Internal Investigation Unit of the Chicago Police Department is misleading. There, the plaintiff police officer conceded that the allegedly objectionable acts of officers of the Internal Investigation Division were *honestly* motivated and had been applied to all police officers. The Court of Appeals concluded that no cause of action had been stated because the acts represented a *legitimate* exercise of duties which the plaintiff conceded the defendants, as members of the Internal Investigation Division, were required to perform. Judge Schnackenberg, the author of the *Magee* opinion and the opinion in the instant case, for that reason distinguished *Magee* from the instant case (petition 16-18).

ARGUMENT

I.

PETITIONERS VIOLATED § 1983 OF THE CIVIL RIGHTS ACT BY ARRESTING AND DETAINING RESPONDENT WITHOUT CAUSE AND BY CAUSING HIM TO BE SUSPENDED FROM DUTY, TO BE FALSELY ACCUSED BEFORE THE POLICE BOARD AND TO BE INDICTED ON THE BASIS OF PERJURED GRAND JURY TESTIMONY, IN ORDER TO EXCULPATE THEMSELVES FROM CRIMINAL CHARGES AND BECAUSE OF THEIR PERSONAL ANIMOSITY FOR OTHER OFFICERS.

In an attempt to create "an issue of national importance" (petition 6) which would justify further review of this case by this Court, petitioners completely misstate the substance of the opinion of the Court of Appeals and the facts alleged in respondent's complaint, and assume the very issue of fact created by the complaint.

Thus, petitioners state (petition 6) "* * * [I]t is an entirely new and different proposition to hold that the federal civil rights acts may be invoked by members of a police department who become dissatisfied with the *lawful* orders of their departmental superiors." (emphasis added)

Respondent does not disagree with this statement as an abstract proposition of law. However, the statement has no application to the instant case. Respondent here has not challenged "the *lawful* orders" of his superiors. On the contrary, he has charged petitioners, fellow police officers, with a vicious pattern of *unlawful* conduct under color of state law committed by petitioners for the purpose of exculpating themselves from criminal charges and to satisfy their personal animosities against fellow police

officers; that to fulfill and satisfy these ulterior and personal motives and animosities, petitioners caused respondent to be wrongfully arrested and detained, to be wrongfully suspended for well over a year from his position on the police force, to be falsely accused before the Police Board, and to be indicted by the grand jury of Cook County on the basis of perjured testimony; as a consequence respondent was forced to defend himself against the false charges before the Police Board and in the Criminal Court of Cook County, at great expense and damage to himself.

Petitioners' only answer to these allegations is a *controverted factual defense* to *one* of the steps in their unlawful conduct—that "respondent was *not* arrested, but rather * * * was obeying the lawful rules and regulations of the Chicago Police Department * * * by appearing at Unit Headquarters and cooperating in a 12 hour investigation by the Internal Investigation Division" (petition 6).*

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* Petitioners' inferential attack on respondent's allegation of arrest, urged more specifically in the Court of Appeals, but not in this court, is not valid. The point was not specifically raised in respondent's motion to dismiss or supporting brief in the trial court (A. 9-22) and should not be available to them for the first time on appeal: Rule 12(h), Federal Rules of Civil Procedure; *Munson Line, Inc.* v. *Green*, 6 F.R.D. 470, 475 (S.D. N.Y. 1949); *Smeed* v. *Carpenter*, 247 F. 2d 414, 418 (C.A. 9, 1960). Secondly, the allegation that petitioners did "arrest the plaintiff * * * did detain the plaintiff for a period of twelve hours (A. 4, ¶ 7)" in itself connotes all legal acts necessary to accomplish an arrest. No physical touching or other similar acts are required. *People* v. *Mirbelle*, 276 Ill. App. 533, 540-2 (1st Dist. 1934). Black's Law Dictionary (4th ed. p. 140) defines "arrest" as "the apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime."

This statement directly conflicts with the allegations of respondent's complaint taken as true for purposes of petitioner's motion to dismiss, and is an improper contention to sustain a dismissal order. As the Court of Appeals stated (App. 19):

> "The short answer to defendants' contention is that a question of fact may be present as to whether *their counsel's* present characterization of the conduct of defendants, as appearing in the complaint, is to be believed, or whether plaintiff's characterization thereof is to be believed. This issue requires that defendants answer the complaint, join issues and permit the trier of facts to decide the factual issues. We cannot decide by merely considering defendants' factual contention as stated in their brief. They should be required to file an answer. *Coleman* v. *Johnson,* 7 Cir., 247 F. 2d 273, 275 (1957)." (italics the Court's)

Petitioners seek to attribute further "unique" qualities to the opinion in question by asserting that the opinion "authorizes the federal civil rights act to be invoked in cases which amount to simple false arrest or malicious prosecution under State tort law" (petition 8).

This statement is incorrect. The Court of Appeals expressly held that it was unnecessary to decide this "abstract proposition" because the unlawful pattern of the several different acts attributed to petitioners "must *all be considered together* in determining whether the complaint sufficiently charges a violation of the civil rights act" (petition 16).

Petitioners incorrectly state that the Court of Appeals "cited no case or precedent for the decision. The reason is obvious. *There is no precedent for the Court of Appeals decision.* The precedent is to the contrary." (emphasis petitioners') (petition 8).

This statement is also incorrect. The civil rights act violations contained in respondent's complaint are so manifest, no citation of authority is required to support the Court of Appeals' conclusion. However, the court did cite its own opinion in *Coleman* v. *Johnson,* 247 F. 2d 273, 275 (C.A. 7, 1957). (petition 19) There, the court held a § 1983 cause of action was stated where plaintiff charged that defendant police officers and prison officials wrongfully arrested and jailed plaintiff without bringing a charge against him and failed to provide medical attention which he obviously needed. The instant case, based on the illegal and ulterior motives attributed to petitioners, is much stronger than the *Coleman* case.

Moreover, respondent referred the court to *ten* other pertinent citations, many of which referred to several other applicable decisions. Petitioners in the Court of Appeals failed to distinguish any of these citations. All of these cases hold that official action impelled by an ulterior or otherwise improper motive violates the constitutional rights of the person affected and therefore, § 1983 of the Civil Rights Act. For example, *Beauregard* v. *Wingard,* 230 F. Supp. 167, 170 (S.D. Cal. 1964 (complaint stated that police officers arrested plaintiff, jailed him and caused him to the charged with the commission of a crime, caused him to be tried in court where he was acquitted, for the purpose of obtaining revenge against plaintiff for having criticized defendant police officers); *Hardwick* v. *Hurley,* 289 F. 2d 529, 531 (C.A. 7, 1961) (plaintiff charged that defendant police officer arrested him and beat him as punishment because of plaintiff's refusal to take a drunkometer test to measure the alcoholic content of his breath); *Culp* v. *U. S.,* 131 F. 2d 98, 98 (C.A. 8, 1942) and *Brown* v. *U. S.,* 204 F. 2d 247 (C.A. 6, 1953) (charge that police officers arrested and jailed

plaintiffs in order to extort money from them); *Bargainer* v. *Michal,* 233 F. Supp. 270, 273 (N.D. Ohio 1964) (plaintiff charged that defendant police officers attacked plaintiff and "subsequently caused false and fraudulent charges to be lodged against him with the Juvenile Court of Cuyohoga County, Ohio in order to 'cover up' the attack upon the plaintiff").

All of the above decisions held that a cause of action was stated under § 1983 because police officers used their official positions to satisfy illegal or ulterior motives unrelated to the honest and legitimate enforcement of law.

Other decisions which hold that official action founded on ulterior or otherwise improper motives constitutes a violation of § 1983 of the Civil Rights Act are *Scolnick* v. *Winston,* 219 F. Supp. 836, 839 (S.D.N.Y. 1963) (Commitment of plaintiffs to a mental institution to intimidate them so that they would be helpless in their investigation of an illegal real estate operation and to prevent the disclosure of a "fixed" tribunal); *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222 (C.A. 7, 1961) (Use of official power of condemnation in order to void construction of a housing development to be occupied on an integrated basis because integration considered obnoxious to local mores); *Corsican Productions* v. *Pitchess,* 338 F. 2d 441 (C.A. 9, 1964) (Threats of prosecution of movie exhibitors by sheriff in order to suppress plaintiff's movie which sheriff considered objectionable); *Robeson* v. *Fanelli,* 94 F. Supp. 62 (S.D.N.Y. 1950) (Refusal to prevent mob from attacking meeting because police wanted meeting to be broken up); and *Spires* v. *Bottorff,* 317 F. 2d 273 (C.A. 7, 1963) (Alleged attempt by judge to discourage warden from permitting prisoner from seeking redress in court, because prisoner had harrassed judge with letters, etc.)

The complaint in the instant case falls squarely within the principles of the above decisions. Here, respondent charges that petitioner without cause or other lawful authority and under color of state law, (1) arrested and detained him for 12 hours, (2) caused him to be suspended from duty, (3) caused an indictment based on perjured testimony to be returned against him, and (4) caused false charges to be filed against him before the police board.

None of these acts were done for purposes of legal and proper law enforcement. On the contrary, these acts were perpetrated because petitioner wanted "to exculpate themselves or fellow police officers assigned to the Internal Investigation Unit from the charges contained in the letter dated November 20, 1960 and because of personal dislike for the commanding officer and other officers assigned to the Englewood Police District * * *" and because plaintiff refused to falsely accuse other police officers (A. 4-5, ¶7).

It is respectfully submitted that any one of the 4 separate wrongful acts committed by petitioners for such ulterior motives violated respondents right to due process of law under the 14th Amendment and more than justify an action under § 1983.

The only authority cited by respondents, *Agnew* v. *City of Compton*, 239 F. 2d 226 (C.A.9, 1957) (pet. 9), to the extent that it is still valid law, supports respondent's position in this case. In *Agnew*, the court held that an illegal arrest resulting from a "law officer's *honest* misunderstanding of law" does not violate the civil rights act (239 F. 2d at 231). In the instant case, respondent unequivocally alleged that his arrest and subsequent maltreatment by petitioners resulted from a *dishonest* motive, not from any misunderstanding.

In addition, the further holding of the *Agnew* case that no civil rights act violation occurs "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons" (p. 229) is an incorrect statement of the law. This holding was specifically overruled by the same court in *Cohen* v. *Norris,* 300 F. 2d 24, 28 (C.A. 9, 1962), based on this Court's decision of *Monroe* v. *Pape,* 365 U.S. 167 (1961).*

II.

THE HOLDING OF THE COURT OF APPEALS IS NOT BASED ON THE "SINGLE ALLEGATION OF ERRONEOUS ARREST OR PROSECUTION."

Petitioners incorrectly state that the Court of Appeals' decision "would afford federal court jurisdiction for the trial of *every* common law action for false arrest or malicious prosecution" or where there is "a single allegation of *erroneous* arrest or prosecution" (petition 11) (emphasis added).

None of these elements is the basis of respondent's complaint. Respondent does *not* allege an "erroneous" arrest or prosecution. Respondent does *not* allege a simple false arrest or malicious prosecution by petitioners. Respondent alleges an *intentional,* comprehensive scheme against respondent whereby petitioners utilized their official police positions to exculpate themselves from

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* The invalidity of this aspect of the *Agnew* case has been repeatedly recognized in other subsequent decisions. For example, see *Roberts* v. *Trapnell,* 213 F. Supp. 49, 50 (E.D. Pa. 1962); *Roberts* v. *Barbosa,* 227 F. Supp. 20, 26 (S.D. Cal. 1964); *Beauregard* v. *Wingard,* 230 F. Supp. 167, 177 (S.D. Cal. 1964) and *Bell* v. *Hosse,* 31 F.R.D. 181, 184 (M.D. Tenn. 1962).

criminal charges and to satisfy their own personal animosity against other officers, including respondent.

Respondent must prove these allegations at trial—not the simple allegations of an erroneous false arrest or prosecution which petitioners would attribute to the complaint herein. No improper invasion of the *lawful* operations of the Chicago Police Department will result.

Conclusion.

For all of the above reasons, it is respectfully submitted that the instant petition should be denied.

Respectfully submitted,

JAMES P. CHAPMAN
Attorney for respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 289

JOSEPH MORRIS, FRANCIS J. BAILEY, ARTHUR P. LINDSEY, LESTER M. ANGLIN, JESSE J. WORD, EDWIN E. WILLIAMS, ALVIN J. PALMER, WILLIAM D. CROWELL, DAVID MOZEE, SAMUEL MOSELY, COLUMBUS C. BROOKS, JR.,

Petitioners,

vs.

RICHARD ATTREAU,

Respondent.

REPLY BRIEF.

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,
511 City Hall Building,
Chicago, Illinois 60602,

SYDNEY R. DREBIN,
MARVIN E. ASPEN,
Assistant Corporation Counsel,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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vs.

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Respondent.

REPLY BRIEF.

In reply to respondent's brief in opposition to the petition for writ of certiorari, petitioners state as follows:

I.

Respondent attempts to minimize the pronouncements of *Magee* v. *Williams,* 329 F. 2d 470 (7th Cir. 1964) as to the functions of the Internal Investigation Division of the Chicago Police Department and to gloss over the obvious inconsistency between *Magee* and the instant cause. Respondent states that in *Magee* "the plaintiff police officer conceded that the allegedly objectionable acts of officers

of the Internal Investigation Division were *honestly* motivated . . .'' (Respondent's Br., p. 3, f. n.) (Emphasis supplied by Respondent.) A reading of *Magee* shows the opposite to be correct. In *Magee,* the Seventh Circuit set out plaintiff's charge (as stated in his complaint) that the defendants' actions were allegedly *dishonestly* motivated, saying (p. 473):

> ''On or about August 17, 1962, plaintiff lawfully arrested Eubanks for aggravated assault involving a deadly weapon, on the complaint of a minor. Plaintiff charges on information and belief that defendant Eubanks, a police officer, persuaded his superiors to attempt an entrapment of plaintiff as aforesaid and to enter the charged conspiracy in order to discredit plaintiff and make him less effective in the matter of the charges against defendant Eubanks.''

The Seventh Circuit upheld the dismissal of the complaint in *Magee.*

The essence of the *Magee* holding is the same as the rationale underlying the basic contention of the petitioners herein: A police officer is subject to the supervision of his official activities and may not invoke the federal civil rights act to challenge such supervision. In the instant cause, Circuit Court Judge Knoch (dissenting opinion) correctly observed that ''as a policeman, surely plaintiff was subject to supervision of his official activities'' (Appendix A of Petition, p. 20).

II.

Petitioners state that the opinion ''authorizes the federal civil rights act to be invoked in cases which amount to simple false arrest or malicious prosecution under State tort law'' and that ''no case or precedent is cited'' for such authorization (Petition, p. 8). Respondent charges that this statement is incorrect and cites a host of cases

which allegedly are precedent for invoking the federal civil rights act in cases of simple false arrest or malicious prosecution (Respondent's Br., pp. 6-8). A reading of these cases shows (a) no such statements are made therein, and (b) all such cases involve aggravated conduct over and above simple false arrest or malicious misconduct.

It is an easy matter for respondent to allege: "The civil rights act violations contained in Respondent's complaint are so manifest, no citation of authority is required to support the Court of Appeals' conclusion" [sic.] (Respondent's Br., p. 7). However, the fact remains that the Seventh Circuit failed to cite any authority, not because the alleged violations were "so manifest", but, because the issue involved is one of first impression for which there is no authority to cite.

III.

Respondent makes much of the fact that the holding of *Agnew* v. *City of Compton,* 239 F. 2d 226 (9th Cir. 1957) to the effect that a complaint is defective "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons" (p. 229) has been overruled (Respondent's Br., p. 10 and f.n.). This is misleading. In citing *Agnew,* petitioners informed this Court of such and cited the very case wherein this aspect of *Agnew* was overruled (Petition, p. 9). However, that portion of the *Agnew* opinion which supports our contention that a false arrest in and of itself does not invoke civil rights act liability *has not* been overruled.

IV.

Respondent insists that the "instant case raises no new or unusual questions of law nor does it conflict with any decision of this Court or any other federal court" (Respondent's Br., p. 2). Both contentions are incorrect.

As shown in our Petition, the instant case raises the new and unusual question of whether the civil rights act may be invoked to review the internal administrative and disciplinary procedures of a local police department. Moreover, the opinion of the Court of Appeals does conflict with the rationale of previous holdings of federal courts. See, *e. g.*, the *Magee* and *Agnew* cases cited herein.

Conclusion.

For the foregoing reasons and for the reasons set forth in the petition, petitioners pray that a writ of certiorari issue to the United States Court of Appeals, Seventh Circuit.

Respectfully submitted,

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,
511 City Hall Building,
Chicago, Illinois 60602,

SYDNEY R. DREBIN,
MARVIN E. ASPEN,
Assistant Corporation Counsel,
Attorneys for Petitioners.